

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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U.S. DISTRICT COURT
DISTRICT OF MASS

IN RE PHARMACEUTICAL INDUSTRY
AVERAGE WHOLESALE PRICE
LITIGATION

) MDL No. 1456

) CIVIL ACTION: 01-CV-12257 PBS

THIS DOCUMENT RELATES TO ALL
CLASS ACTIONS

) Judge Patti B. Saris

**LEAD CLASS COUNSELS' RESPONSE AND OPPOSITION TO PLAINTIFF
ROBERT J. SWANSTON'S MOTION TO COMPEL ACCESS TO MDL
PLAINTIFFS' DOCUMENT DEPOSITORY AND/OR TO COMPEL
PRODUCTION OF DOCUMENTS BY DEFENDANTS, AND FOR SANCTIONS**

Lead Counsel Committee and Liaison Class Counsel in the above-captioned matter (hereafter "Lead Counsel") hereby respond to and oppose Plaintiff Robert J. Swanston's ("*Swanston's*") Motion to Compel Access to MDL Plaintiffs' Document Depository and/or Compel Production of Documents by Defendants, and For Sanctions (the "Motion") to the extent the Motion is directed at Lead Counsel or would force Lead Counsel to give unfettered access to attorneys for *Swanston* to the documents in Plaintiffs' document depository. Lead Counsel takes no position with respect to that portion of the Motion directed toward Defendants.

I. INTRODUCTION

The Motion misrepresents Lead Counsel's actions with respect to counsel for *Swanston*, ignores Case Management Orders entered by this Court and seeks to defeat the efficiencies contemplated by the creation of an MDL in this matter and the appointment of Lead Counsel in the case. The Motion should be denied.

Pursuant to Case Management Order No. 1, Lead Counsel have been appointed to conduct discovery with respect to each of the class action claims transferred to this Court

as part of MDL 1456, which currently include the claims in *Swanston*. Lead Counsel are conducting discovery in an efficient manner, and we are mindful not to duplicate effort by both Plaintiffs and Defendants.

Lead Counsel invited counsel for *Swanston* to participate in a collaborative effort to review Defendants' documents, as it has with all class counsel in MDL 1456. Counsel for *Swanston* was the only law firm that rejected the offer, and they now misrepresent to this Court both that Lead Counsel have wrongly refused access to documents, but also that somehow Lead Counsel have made access to such documents contingent upon *Swanston*'s agreement to abandon his right to seek remand of his case. See Motion at p. 2. No such conditions were placed on Lead Counsel's invitation to counsel for *Swanston* to participate in coordinated discovery in MDL 1456.

In addition to their responsibility to coordinate discovery amongst all class counsel in the MDL, Lead Counsel also agreed to coordinate discovery with government entity plaintiffs in MDL 1456, and to coordinate discovery with any pending state court case that is subsequently designated a "Coordinated State Court Case" pursuant to the provisions of CMO No. 9. Lead Counsel have complied, and will continue to comply, with these obligations.

However, *Swanston* is neither a government entity plaintiff in MDL 1456 or a Coordinated State Court Case. *Swanston* is currently a class action claim pending in MDL 1456 and as such discovery in *Swanston* is to be coordinated by and through Lead Counsel in the manner Lead Counsel finds most efficient. Allowing each plaintiff's counsel to conduct its own uncoordinated discovery process defeats the very efficiencies contemplated by the creation of an MDL.

Lead Counsel are befuddled by the actions of counsel in *Swanston*. In addition to the current motions, counsel in *Swanston* is attempting to set up a separate discovery plan in conflict with this Court's Orders as well as agreements already established between Lead Counsel and each Defendant. Accordingly, Lead Counsel request that counsel for *Swanston* be instructed to fully abide by this Court's Orders and the discovery process established by Lead Counsel.

II. BACKGROUND

Swanston was originally filed in March 2002 in Maricopa County, Arizona as a case related only to the drug Lupron. After Lead Counsel filed the MCC in this action in September 2002, *Swanston* counsel filed the Second Amended Complaint in that case in December 20, 2002, in order to mirror the allegations made in the MCC with respect to the illegal scheme by multiple Defendants to artificially and unlawfully inflate the AWP of their products. *Swanston* was subsequently removed to federal court in Arizona on January 13, 2003 and by motion of Defendant GSK to the Judicial Panel on Multidistrict Litigation ("JPML"), was transferred as a "tag along" action to this Court on June 13, 2003. *Swanston* filed a motion to remand on June 21, 2003 that has been fully briefed. The Court heard oral argument on that motion on October 9, 2003.

On October 24, 2003 counsel for *Swanston* contacted Lead Counsel by letter asking for access to all documents produced by Defendants to date in MDL 1456. At the time Lead Counsel was organizing the details of a further review of discovery materials and trying to determine the most efficient manner of proceeding with an orderly but comprehensive document review given both the number of documents and the number of plaintiffs class counsel involved.

On November 6, 2003 counsel for *Swanston* reiterated their request. Once Lead Counsel had determined the most effective and efficient method of review of discovery materials, and how all class counsel could participate cooperatively in that process, Lead Counsel responded by letter and by telephone inviting counsel for *Swanston*, as class counsel in MDL 1456, to participate in that review. See Letter from Thomas M. Sobol to Donald E. Haviland, attached to Motion as Exhibit Q. Lead Counsel indicated to counsel for *Swanston* that as a class action case pending in MDL 1456, *Swanston* was “subject to the various case management orders” in the MDL, that *Swanston* counsel was welcome to participate in the coordinated discovery organized by Lead Counsel and that although Proposed Case Management Order No. 9 contemplates “informal discovery coordination agreement with various state court cases,” *Swanston* was not then, nor is it now, pending in state court. No conditions were set by Lead Counsel for *Swanston*’s participation in discovery review and no suggestion was made to counsel for *Swanston* that such participation was contingent upon his agreement to abandon efforts to have the case remanded.

On November 17, 2003 counsel for *Swanston* replied and rejected any coordination of discovery with other plaintiffs in the MDL. See Motion, Exhibit R. Without seeking to further communicate with Lead Counsel concerning these issues, and certainly without complying with Local Rule 37.1 in an attempt to narrow the issues before the Court¹, counsel for *Swanston* filed the instant Motion seeking access to all documents produced by Defendants in the MDL and sanctions, in part, against Lead Counsel.

¹ The Motion fails to comply with Local Rule 37.1 in that it neither indicates whether a discovery conference was held or the reason why one was not held. In fact, no certification with respect to Local Rule 37.1 is included anywhere in the Motion.

III. ARGUMENT

A. Swanston is a Class Case Pending in MDL 1456 and is Consolidated For Pre-trial Proceedings Under the Direction of Lead Counsel

Case Management Order No. 1 (“CMO 1”) entered on June 14, 2002 consolidated each of the class actions then pending in MDL 1456 and by its terms applies to each class case subsequently filed or transferred into MDL 1456. CMO 1 at ¶6. Section IV of CMO 1, as later amended, established both Liaison Counsel and a Lead Counsel Committee for all class plaintiffs in the MDL. Lead Counsel Committee was granted “sole authority over . . . the scope, order and conduct of all discovery proceedings . . .” as well as the responsibility to make “such work assignments to other Plaintiffs’ counsel as they deem appropriate.” CMO 1 at ¶ 12. Furthermore, CMO 1 directs that Lead Counsel “shall have responsibility for major decisions on behalf of Plaintiffs’ counsel regarding the overall prosecution of the Consolidated Actions and shall be responsible for the establishment of working committees for the efficient prosecution of the litigation and the appointment of chair persons and members of such committees.” *Id.*

Appointment of lead and liaison counsel in large complex litigation such as MDL 1456 is recognized as an essential tool in the Court’s efforts to streamline pre-trial proceedings and to eliminate waste and inefficiency in complex matters. See *Manual for Complex Litigation* (3d ed.) §20.221. The JPML has long recognized that “one of the purposes of coordinating or consolidating pretrial proceedings is to streamline the efforts of the parties and witnesses, their counsel and the judiciary in order to effectuate an overall savings of costs and a minimum of inconvenience to all concerned.” *In re Nissan Motor Corp. Antitrust Litigation*, 385 F. Supp. 1253 (J.P.M.L. 1974) judgment aff’d, 577 F.2d 910 (5th Cir. 1978).

Swanston is, by the terms of CMO 1, currently consolidated for pre-trial purposes with the other class cases that have been transferred to MDL 1456. Until such time as the Court decides to remand *Swanston*, the claims in *Swanston* should be managed, for pre-trial purposes, by Lead Counsel, in consultation with other plaintiffs' counsel, including counsel for *Swanston*. This includes coordination of discovery efforts, and document review, in the manner designated by Lead Counsel.

Lead Counsel has not sought to exclude *Swanston* counsel from this process. To the contrary they have explicitly invited *Swanston* counsel to participate as they have invited the all other Plaintiffs' class counsel to participate. *Swanston's* counsel apparently believes that each of the dozen different plaintiff law firms in this MDL can run the case however they wish. In contrast, a coordinated discovery review of Lead Counsel believe this is the most efficient means of conducting review of discovery in the case. Currently, there are dozens of lawyers about twelve (12) Plaintiffs' firms in MDL 1456 reviewing documents in three separate locations throughout the country, and other plaintiffs' class counsel have committed to participate in the review of documents as they are produced by Defendants and other third parties. No other Plaintiffs' counsel in any of the separate class cases transferred to MDL 1456 have objected to this process, refused to participate or demanded their own independent discovery process. Allowing each plaintiff's counsel in the MDL to spend the time and money to duplicate and independently review the millions of pages of documents produced, or to be produced, in this matter is inefficient, wasteful, and defeats the very purpose of having an MDL proceeding.

B. Case Management Order No. 9 Does Not Concern *Swanston*

On November 17, 2003 this court entered Case Management Order No. 9 (“CMO 9”). The terms of CMO 9 were agreed to by Lead Counsel and Defendants and submitted to the Court as an agreed upon order. CMO 9 reiterates Lead Counsel’s responsibility to coordinate discovery for class plaintiffs in the MDL and assigns to Lead Counsel the additional responsibility of coordinating discovery “with all plaintiffs in cases brought by government entities, and with any private opt out plaintiffs should any emerge.” CMO 9 at ¶1. CMO 9 also sets forth a procedure whereby related state court proceedings may, at the election of each State Court, designate those state cases “Coordinated State Court Cases” and order that the parties in the state cases coordinate discovery with the discovery proceedings in MDL 1456. *Id.* at ¶¶ 1-3.

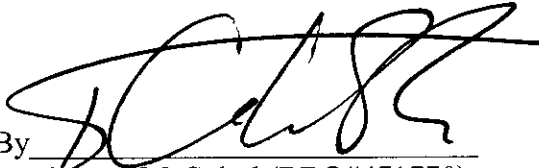
Nowhere does the Court order by virtue of CMO 9, as *Swanston* contends in his Motion, that *Swanston* “is entitled to the discovery available to other plaintiffs in the MDL proceedings.” Motion at p. 9. *Swanston* is neither a case brought by a government entity nor a Coordinated State Court Case. The fact that Defendants may have identified counsel for *Swanston*’s other state cases related to the drug Lupron as a case related to MDL 1456 does not entitle *Swanston* to sidestep the coordinated discovery efforts being overseen by Lead Counsel in MDL 1456.

IV. CONCLUSION

Lead Counsel has acted fairly and appropriately when dealing with counsel for *Swanston*. Lead Counsel take their obligations to other plaintiffs counsel seriously as they do their responsibility to streamline the discovery process in this complex matter and avoid unnecessary and duplicative effort on behalf of all parties, not the least of which amongst plaintiffs’ counsel.

The Motion is unfounded as it related to Lead Counsel and the call for sanctions is wholly inappropriate. The Motion should be denied in its entirety. In addition, counsel in *Swanston* should be instructed to fully abide by this Court's Orders and the discovery process established by Lead Counsel.

DATED: January 13, 2004

By 

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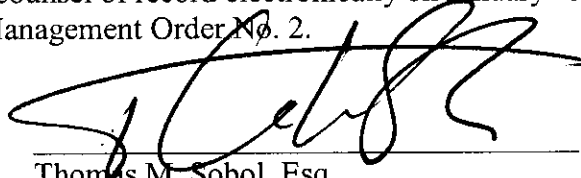
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CERTIFICATE OF SERVICE

I hereby certify that I, Thomas M. Sobol, an attorney, caused a true and correct copy of the foregoing Lead Class Counsels' Response And Opposition To Plaintiff Robert J. Swanston's Motion To Compel Access To MDL Plaintiffs' Document Depository And/Or To Compel Production Of Documents By Defendants, And For Sanctions to be served on all counsel of record electronically on January 13, 2004, pursuant to Section D of Case Management Order No. 2.

A handwritten signature in black ink, appearing to read 'T. Sobol', is written over a horizontal line.

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